Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Nationwide Programmatic Agreement	)	
Regarding the Section 106 National Historic	)	WT Docket No. 03-128
Preservation Act Review Process	)	

To: The Commission

COMMENTS

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SUMMARY

The adoption of a programmatic agreement ("Agreement") that protects historic interests, yet streamlines the review process, is a laudable goal. The current agreement contains a number of flaws, however, that must be corrected. First, the Agreement and the Commission's rules should include a safe harbor for licensees that acquire facilities for which the prior owner may not have conducted an NHPA review. The purpose of the forfeiture provisions set forth in the Act and the Commission's rules would not be served by penalizing innocent licensees for the non-compliance of others.

Second, consistent with the Collocation Agreement and other programmatic agreements, the subject Agreement should not apply to Native American tribes. Tribal consultation raises a number of complicated issues that should be addressed in a separate proceeding.

Finally, specific provisions within the Agreement should be altered to ensure finality, consistency, and predictability for all parties and to make the Agreement more effective. Cingular has supplied black-lined versions of its proposals, along with the basis for the proposed changes, in Section II.

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COMMENTS

Cingular Wireless LLC ("Cingular") hereby submits its comments in response to the above-captioned *Notice of Proposed Rulemaking* ("*Notice*").[1] The *Notice* seeks comment on a draft Nationwide Programmatic Agreement ("Agreement") that is intended to streamline the historic review process under the National Historic Preservation Act of 1966 ("NHPA")[2] for the construction and modification of communications towers.

Cingular's comments are divided into two sections. The first section discusses broad, threshold issues that must be addressed prior to adoption of the Agreement. This section notes that the Agreement and the Commission's rules should include a safe harbor for licensees that acquire facilities for which the prior owner may not have conducted an NHPA review. Moreover, consistent with the Collocation Agreement, this section proposes that the Agreement not apply to Native American tribes.

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[1] *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, *Notice of Proposed Rulemaking*, FCC 03-125 (June 9, 2003).

[2] 16 U.S.C. § 470 *et seq.*

In the second section, Cingular proposes changes to specific provisions within the Agreement. These changes are designed to achieve finality, consistency, and predictability for all parties and to make the Agreement more effective.

I. THRESHOLD ISSUES

A. The Agreement and the Commission's Rules Should Create a Safe Harbor for Licensees that Acquire Facilities that were Previously Constructed Without NHPA Review

The Agreement is designed to create a comprehensive framework for addressing the impact communications facilities may have on historic properties. Neither the Agreement, nor the Commission's rules, however, addresses how a licensee will be treated when it acquires a tower that was constructed without required NHPA review. Accordingly, language should be added to Section IX of the Agreement[3] that would create a "safe harbor" from liability if a licensee or tower owner can demonstrate that it was not responsible for any construction or modification of the facility that would have triggered NHPA review.

Title V of the Communications Act authorizes the Commission to impose penalties on "any person who willfully and knowingly" violates the Act.[4] Consistent therewith, the Commission's rules permit the assessment of forfeitures against any person that "willfully or repeatedly failed to comply" with FCC rules.[5] These provisions were designed to deter licensee misconduct. Imposing a forfeiture against an entity that innocently acquires a tower that was constructed without NHPA review does not serve this goal. It does not deter licensee misconduct and penalizes an innocent party rather than the wrongdoer. In the past, the

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[3] A corresponding note should be added to Section 1.1307 of the Commission's rules.

[4] 47 U.S.C. § 501.

[5] 47 C.F.R. §1.80.

Commission has recognized that forfeitures are not appropriate when the wrongdoer is no longer associated with the license or facility.[6]

These same considerations warrant the creation of a safe harbor for persons that acquire towers that may have been constructed in violation of the NHPA. The new owners were not responsible for the construction of the facility, and thus were not responsible for the impact on historic properties.

B. Tribal Consultation Should Be Outside the Scope of This Agreement

Cingular agrees with the Advisory Council on Historic Preservation ("Council"), the National Conference of SHPOs, the Cellular Telecommunications and Internet Association ("CTIA"), the Personal Communications Industry Association ("PCIA"), and the National Association of Broadcasters that tribal consultation should be outside of the scope of this Agreement and addressed in a separate proceeding.[7] As noted by the Council, such an approach would be consistent with that taken in other programmatic agreements, which have excluded undertakings outside tribal lands from review without a provision for tribal notice.[8]

Tribal consultation presents unique, complex issues that would be better resolved in an agreement dedicated to Native American issues. By initiating a separate proceeding, the FCC would provide a forum for all parties to develop not only a framework for the resolution of tribal issues, it also would permit the parties to engage in a useful dialog aimed at eliminating informational roadblocks which frustrate everyone's desire to regularize the process. For

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[6] *See Dennis Elam, Trustee for Bakcor Broadcasting, Inc.*, 11 F.C.C.R. 1137 (1996); *see also Diamond Broadcasting of California, Inc.*, 11 F.C.C.R. 7388 (1996) (NAL rescinded where court orders removal of licensee/wrongdoer in state receivership action and imposition of forfeiture would only harm innocent creditors).

[7] *NPRM* at A-10.

[8] *NPRM* at A-10.

example, it is often difficult for carriers to determine which tribes should be included in the consultation process, which tribal members should be contacted as representing the tribe, and whether a proposal would have a potential impact from a tribal perspective. Based on past experience, the relevant tribe is often unable to determine potential impacts. Cingular has received several letters from tribes requesting that Cingular perform an archeological assessment prior to constructing a tower because the tribe does not know if a given property may have religious and cultural significance.[9] The cost, delay, and uncertainties associated with the current process are tremendous and should motivate all parties to work toward remedies for these shortcomings.

In the alternative, Cingular supports significant revisions to those portions of the proposed Agreement that relate to tribal consultation. Section 106(d) of the NHPA only requires consultation with tribes regarding those properties of traditional religious and cultural importance that are listed in or eligible for the National Register.[10] Section 106(d) does not require carriers to conduct archeological studies for every proposed undertaking on the off chance that they might discover a significant site. Thus, Cingular recommends that the notice provision contained in Section III.B be deleted.

To the extent tribes want to be included in the process, it is critical that the notice provision in Section V.D be revised to require SHPOs to maintain a list of Tribal Historic Preservation Officers ("THPOs") that should be treated as consulting parties and to require THPOs to designate a single clearinghouse for all carrier notices. No more than one THPO per tribe would be placed on the list. To be included on the list, a THPO should be required to

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[9] *See* Attachment 1, Letter from The Tulalip Tribes to LSI Adapt (June 18, 2003); Letter from the Ahamakav Cultural Society to Environmental Assessment Specialists, Inc. (May 16, 2003).

[10] 16 U.S.C. § 470(d)(6)(A) & (B).

identify properties that are of religious or cultural significance to its tribe. The THPO then would provide this information, along with its basis, to the appropriate SHPO. The THPO could request confidential treatment of the specific information by the SHPO, as necessary. SHPOs would maintain lists of all properties within their jurisdictions that tribes have indicated are of religious or cultural significance, and could include tribal information in their analyses of potential impacts when consulting with carriers. Carriers would not be responsible for the impact to a property if the Native American tribe failed to designate a single THPO pursuant to Section 106(d)(2)[11] and to notify the SHPO of specific geographic areas of interest.

This list should be area specific – a THPO should only be considered a consulting party if it provides a SHPO with specific geographic areas of interest within the SHPO's jurisdiction and a carrier proposes construction in such an area. The THPO areas of interest should be narrowly tailored based on archeological studies conducted by the tribe or similar tribal documentation and be geographically defined by items such as map coordinates or topographical features that identify small, distinct areas of historic, religious, or cultural significance to the tribe. Absent this precise information, carriers should not be required to delay construction. Thus, it would be impermissible for THPOs to designate entire counties as potentially significant.

The Agreement also should require THPOs to designate a central clearinghouse for the receipt of information from carriers. This would eliminate uncertainty regarding THPO contact information and would expedite the coordination process.

This tailored approach would provide significant benefits to all parties involved: carriers would have timely access to reliable information regarding the potential impact of their construction; tribes would have a more effective means of protecting properties that are of

[11] 16 U.S.C. § 470(d)(2).

religious and cultural importance; and SHPOs would receive meaningful information to help them identify properties within their jurisdiction that should be listed on the National Register.

As a corollary to its proposal, Cingular recommends the elimination of Section IV, Participation of Indian Tribes and Native Hawaiian Organizations in Undertakings Off Tribal Lands; Tribal Consultation.[12] Both alternatives of this section impose obligations on carriers that far surpass the requirements of Section 106(d)(6). Alternative A is replete with open-ended obligations imposed on carriers, with virtually no corresponding obligations imposed on tribes. For example, efforts to identify tribes that may be affected "include, but are not limited to, seeking relevant information from the relevant SHPO/THPO, tribes, state agencies, the U.S. Bureau of Indian Affairs, or, where applicable, any federal agency with land holdings within the state."[13] Carriers also must contact the tribes directly.[14] In addition, by stating that "an Applicant should not assume that failure to respond to a single communication establishes that an Indian tribe or NHO is not interested in participating,"[15] carriers would have to continually follow-up with tribes who fail to respond to communications, or do not respond in a timely manner. Alternative B is similarly flawed because it requires the Commission to consult directly with the tribe, but imposes no time restrictions on Commission or tribal action.[16]

II. SPECIFIC SUGGESTED REVISIONS

The adoption of a programmatic agreement that protects historic interests, yet streamlines the review process, is a laudable goal. The wireless industry is highly competitive, with

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[12] *NPRM* at A-11 – A-15.

[13] *NPRM* at A-12.

[14] *NPRM* at A-12.

[15] *NPRM* at A-12.

[16] *NPRM* at A-15 – A-15.

countless carriers in an ever-growing number of services competing for a limited number of subscribers. There is tremendous pressure to deploy new services and improve coverage on existing networks in a short timeframe. Such deployment is contingent on construction or modification of wireless facilities. The Commission's historic review process, however, imposes significant costs, delay, and uncertainty on carriers attempting to construct or modify these facilities. This uncertainty persists even years after towers are constructed, when carriers may be subject to liability for claims arising from actions that occurred long ago. Concerns include forfeitures and the loss of key wireless sites that may form the backbone for entire wireless networks.

Although the Commission currently has rules in place to satisfy the requirements of Section 106 of the NHPA,[17] there is significant room for improvement in implementing these rules. Thus, Cingular supports adoption of a nationwide programmatic agreement that provides clear guidance regarding the review process, imposes reasonable deadlines, applies uniformly to all relevant parties, and prohibits parties from reopening issues that have been resolved. In short, the Agreement should provide clarity, predictability, and finality. The current proposal falls far short of achieving these goals.

Cingular's specific recommendations for revising the Commission's rules and the Agreement to achieve these goals are set forth below. Blacklined versions of the relevant Agreement provisions are included, followed by a brief discussion setting forth the rationale for the changes.

[17] *See* 47 C.F.R. § 1.1307(a)(4).

Recommendation:

I.B This Nationwide Agreement applies only to federal Undertakings as determined by the Commission ("Undertakings"). The Commission and the courts have ~~has sole~~ authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA. ~~Nothing in this Agreement shall preclude the Commission from revisiting or affect the existing ability of any person to challenge any prior determination of what does or does not constitute an Undertaking.~~ The Commission will not revisit, and will not entertain challenges to, determinations regarding what constitutes an Undertaking that are made in accordance with this Agreement. The Commission may alter its definition of an Undertaking, however, on a prospective basis in accordance with the Administrative Procedure Act. Maintenance and servicing of Towers, Antennas, and associated equipment are not deemed to be Undertakings subject to Section 106 review.

Discussion:

This section should be revised for accuracy to state that the courts also may have jurisdiction in determining what activities constitute Undertakings. Cingular also recommends that this section be revised to ensure that Applicants who proceed in accordance with the terms of this Agreement will have finality and that "final" determinations made in accordance with this Agreement cannot be re-opened years later.

Recommendation:

I.G This Agreement does not affect or supercede existing agreements that an individual SHPO or group of SHPOs may have entered into with a carrier regarding the Section 106 review process.

Discussion:

The Commission should add this section to clarify that, insofar as SHPOs have entered into streamlining agreements Commission licensees, those agreements remain in effect. Failure to clarify this issue will lead to confusion and could jeopardize the tremendous work that SHPOs and licensees have undertaken to tailor the review process.

Recommendation:

II.A.2 Applicant. A Commission licensee, permittee, or ASR registration holder, or an applicant or prospective applicant for a wireless or broadcast license, authorization or antenna structure registration, and ~~the duly authorized~~ agents, employees, and contractors of any such person or entity that are duly authorized to file FCC applications.

Discussion:

This definition should be revised to clarify "registration holder" refers to an ASR, and that "duly authorized" refers to the ability to file FCC applications.

Recommendation:

II.A.7 Facility. ~~A Tower or an Antenna. The term Facility may also refer to a Tower and its associated Antenna(s).~~ The radiating and receiving elements, its supporting structures, towers, and all appurtenances mounted thereon.

Discussion:

To reduce confusion, the Commission should revise this definition such that a Facility is defined as a combination of an Antenna *and* a Tower, not just another word for either an antenna or a tower.

Recommendation:

II.B All other terms not defined above or elsewhere in this Agreement shall have the same meaning as set forth in the Council's rules section on Definitions (36 C.F.R. § 800.16) or the Commission's rules (47 C.F.R. §§ 1.1301-1.1319). In case of conflict, the Commission's rules will govern.

Discussion:

The Agreement should be modified to specify which rules will govern if there is a conflict between the Commission's and the Council's rules.

Recommendation:

II.C For the calculation of time periods under this Agreement, ~~"days" mean "calendar days." Any time period specified in the Agreement that ends on a weekend or a Federal or State holiday is extended until the close of the following business day~~ refer to Section 1.4 of the Commission's rules (47 C.F.R. § 1.4).

Discussion:

To reduce confusion, the Commission should foster consistency between its existing rules and the Agreement.

Recommendation:

III.A.4 Construction of a Facility 400 feet or less in overall height above ground level on a property that is zoned for, or in actual use ~~solely~~ for, industrial, commercial, and/or government-office purposes and that occupies an area of 10,000 square feet or more, or that together with adjacent industrial, commercial, and/or government-office properties occupies an area of 10,000 square feet or more, where no structure 45 years or older is located within 200 feet of the proposed Facility, and where all areas to be excavated will be located on ground that has been previously disturbed as defined in Section VI.C.4 below.

Discussion:

The Commission should clarify that this exclusion is satisfied if the property is either zoned or used solely for relevant purposes. Construction of a tower will not change the character of an area whether it is zoned or used for industrial, commercial, and/or government-office purposes.

Recommendation:

~~III.A.5, footnote 5: The Conference has proposed a modification to Section III.A.5 that would allow individual SHPOs to "opt out" of this exclusion where historic properties are likely to be present in such corridors. SHPO opt out would be contingent on agreement to consult with applicants and engage in good faith efforts to identify alternate locations for the location of communications facilities pursuant to Section III.A.6. The National Trust is in support of the Conference draft "opt-out" language for railway corridors in active use for passenger trains. CTIA objects to an opt-out provision because it reverts back to addressing key exclusions on a state-by-state basis with no guarantees that the parties will reach consensus. CTIA also expressed its concern that the proposed opt-out provision would result in an additional 12-18 month negotiation process with each state that chooses to opt out in addition to what has already been a lengthy process, *i.e.*, two years.~~

Discussion:

Cingular agrees with CTIA's assertion that an opt-out provision reverts back to addressing key exclusions on a state-by-state basis with no guarantees that the parties will reach consensus, and that the provision would needlessly delay the negotiation process. Further, an opt-out provision would undermine one of the overarching goals of the Agreement – creating a process that will have a predictable course and duration.

Recommendation:

V.C.4 The written notice to the local government and to the public shall include: (1) the location of the proposed Facility including its street address; (2) a description of the proposed Facility including its height and type of structure; (3) instruction on how to submit comments regarding potential effects on Historic Properties; and (4) the name, address, and telephone number or email address of a contact person.

Discussion:

The contact person should be able to specify either a telephone number or an email address. Email communications may be preferable because they provide a tracking mechanism for comments received.

Recommendation:

V.D A SHPO/~~THPO~~ shall make available lists of other groups, including ~~tribes and organizations of tribes~~ THPOs, which should be provided notice for Undertakings to be located in ~~particular~~ specific areas identified by the interested group. This

list will specifically identify all properties within the SPHO's jurisdiction that tribes have indicated are of religious or cultural significance. To ensure that its interests are adequately considered, a tribe must designate a single THPO pursuant to Section 106(d)(2) of the NHPA, who (i) must identify specific properties or narrowly tailored geographic areas that are of religious or cultural significance to its tribe based on archeological studies conducted by the tribe or similar tribal documentation and geographically defined by items such as map coordinates or topographical features; and (ii) must provide this information, along with the basis of the significance, to the appropriate SHPO. The THPO may request confidential treatment of the specific information provided.

Discussion:

Insofar as the Commission declines to adopt Cingular's recommendation that tribal consultation be excluded from the scope of this Agreement (*see* Section I.B *supra*), Cingular urges the Commission to adopt the language suggested above. This approach would provide significant benefits to all parties involved: carriers would have timely access to reliable information regarding the potential impact of their Undertakings; tribes would have a more effective means of protecting properties that are of religious and cultural importance; and SHPOs would receive meaningful information to help them determine properties within their jurisdiction that should be listed on the National Register.

Recommendation:

V.F The relevant SHPO~~/THPO~~ and local government, as well as ~~and~~Indian tribes and NHOs that choose to participate pursuant to Section V.D, that attach religious and cultural significance to Historic properties that may be affected are entitled to be consulting parties in the Section 106 review of an Undertaking. The Council may enter the Section 106 process for a given Undertaking, on invitation or on its own decision, according to its rules. An Applicant shall consider all written requests ~~of other individuals and organizations~~ to participate as consulting parties that are received within 30 days of public notice, and shall determine which should be consulting parties. An Applicant is encouraged to grant such status to individuals or organizations with a demonstrated legal or economic interest in the Undertaking, or demonstrated expertise or standing as a representative of local or public interest in historic or cultural resources preservation. Any such individual or organization denied consulting party status may petition the Commission for review of such denial. Applicants may seek assistance from the Commission in identifying and involving consulting parties.

Discussion:

In order to ensure that historic reviews are conducted in an efficient, predictable manner, this section should be revised to require the submission of requests to participate as consulting parties within 30 days of public notice. Parties should not be allowed to enter the consultative process and raise new issues at the eleventh hour.

Recommendation:

V.G Consulting parties are entitled to: (1) receive notices, copies of submission packets, correspondence and other documents provided to the SHPO/THPO in a Section 106 review; and (2) be provided a 30-day opportunity to have their views expressed and taken into account by the Applicant, the SHPO/THPO and, where appropriate, by the Commission. Information contained in submission packets is confidential and may not be released by any consulting party without the express written consent of the Applicant.

Discussion:

In order to ensure that historic reviews are conducted in an efficient, predictable manner, this section should be revised to require the submission of requests to participate as consulting parties within 30 days of public notice. Parties should not be allowed to enter the consultative process and raise new issues at the eleventh hour. Applicants also should be allowed to request confidential treatment of proprietary or sensitive business information.

Recommendation:

VI.B.2.a.1 Within a half mile of the proposed tower, if the proposed tower is 200 feet or less above ground level ("AGL") in overall height;

VI.B.2.a.2 Within 3/4 mile of the proposed tower, if the proposed tower is more than 200 feet but no more than 400 feet AGL in overall height;

VI.B.2.a.3 Within 1 ½ miles of the proposed tower, if the proposed tower is more than 400 feet AGL in overall height.

Discussion:

For the sake of clarity, the definition should specify that heights are above ground level.

Recommendation:

VI.B.2.c If the parties, after using good faith efforts, cannot reach agreement on the use of an alternative APE, either the Applicant or the SHPO/THPO may submit the issue to the Commission for resolution. If the opposing party fails to file a response with the Commission within 30 days, the filing party's proposal will be deemed to be accepted. If a response is filed, the Commission shall make its determination concerning an alternative APE within ~~a reasonable period of time~~ 90 days of receipt.

Discussion:

As discussed above, in order to ensure that historic reviews are conducted in an efficient, predictable manner, this section should be revised to require the submission of oppositions within 30 days and FCC resolution of disputes in a timely manner. Simply stating that the FCC will act in a "reasonable" period of time does not provide certainty. Congress has recognized that the failure of local zoning boards to issue siting decisions in a timely manner adversely affects CMRS carriers. *See* 47 U.S.C. § 332(c)(7)(B)(4). Carriers need site approval in a timely

manner in order to address capacity and coverage concerns. These sites often eliminate dead spots, thereby extending coverage, which in turn extends the availability of Commission-mandated E911 services.

Recommendation:

VI.C.3 No archeological survey shall be required if the Undertaking is unlikely to cause direct effects to archeological sites. THPOs ~~Tribes and NHOs~~ bear the burden of demonstrating that a particular site may be of religious or cultural significance, and cannot ~~routinely~~ require Applicants to perform archeological surveys without a thorough written explanation for the belief that the particular site may be of religious or cultural significance. Moreover, the significance of the area must have been previously disclosed to a SHPO in accordance with Section V.D. Disagreements regarding the necessity for an archeological survey may be referred to the Commission for resolution. The Commission will act on such requests for resolution within 90 days of receipt.

Discussion:

As discussed above, in order to ensure that historic reviews are conducted in an efficient, predictable manner, this section should be revised to require that tribes, not Applicants, identify properties that may be of religious or cultural significance. Tribal leaders, rather than Applicants, are the parties knowledgeable about the religious and cultural history of the tribe. The section also should be revised to require that the FCC resolve disputes in a set timeframe.

Recommendation:

VI.C.4 It may be assumed that no archeological resources exist within the APE where all areas to be excavated related to the proposed Facility will be located on ground that has been previously disturbed to a depth of (1) two feet or (2) six inches deeper than the general depth of the anticipated disturbance (excluding footings and similar limited areas of deep excavation), whichever is greater, and where no archeological resources are recorded in files of the SHPO~~/THPO or any potentially affected Indian tribe or NHO.~~ Site grading of less than two feet does not constitute excavation and shall not be considered to have a significant impact on archeological or historic resources.

Discussion:

This section should be revised to clarify that general site grading does not affect the exclusionary provisions of the Agreement. If grading is considered excavation, the exclusionary provisions are of very limited utility to carriers. Also, in accordance with Cingular's proposed revisions to Section V.D of the Agreement, tribes should provide information regarding properties that are of religious or cultural significance to the relevant SHPO.

Recommendation:

VI.E An Undertaking will have a visual adverse effect on a Historic Property if the visual effect from the Facility will noticeably diminish the integrity of one or more of the characteristics qualifying the property for inclusion in or eligibility

for the National Register. Construction of a Facility will not cause a visual adverse effect except where ~~visual setting or visual elements are character-defining features of eligibility~~ the Facility noticeably diminishes the visual elements of the setting of a Historic Property, where such elements are important elements of that historic property's eligibility. Examples of visual adverse effect include facilities located within the actual, or, for unlisted properties, the most logical or reasonable boundary of: (1) a designed landscape which includes scenic vistas, (2) a publicly-interpreted Historic Property where the setting or views are part of the interpretation, (3) a traditional cultural property which includes qualifying natural landscape elements, or (4) a rural historic landscape.

Discussion:

Cingular supports PCIA's proposed revisions with minor changes to ensure clarity. These revisions would help to define the scope of a potential visual adverse effect, such that Applicants could more clearly predict the outcome of their proposed actions.

Recommendation:

VII.A.3 If the Applicant forwards to the SHPO/THPO a comment or objection, in accordance with Section V.F, more than 25 but less than 31 days following its initial submission, the SHPO/THPO shall have five calendar days from receipt of the comment or objection to consider such comment or objection before the Section 106 process is complete or the matter may be submitted to the Commission.

Discussion:

This section should be revised to clarify how the timeframes will be calculated.

Recommendation:

VII.A.4 If the SHPO/THPO determines the Applicant's Submission Packet is inadequate, the SHPO/THPO will immediately return it to the Applicant with a description of any deficiencies. ~~The Applicant may resubmit an amended Submission Packet to the SHPO/THPO any time within 60 days following its receipt of the returned Submission Packet~~. The SHPO's 30-day review period is tolled when the SHPO mails or otherwise returns the Packet, and resumes when the Applicant resubmits an amended Submission Packet to the SHPO. Insofar as the SHPO and the Applicant disagree regarding the sufficiency of the Packet, either party may refer the dispute to the Commission, which will issue a decision within 90 days.

Discussion:

Cingular agrees with CTIA and PCIA that the Agreement should include language that specifically states when the 30-day period is tolled and when and if the clock restarts with respect to the 30-day review period. Cingular also supports the elimination of the 60-day limit on resubmissions, and the insertion of language quantifying the time for Commission resolution of disputes. Carriers should be able to resubmit at any time after deficiencies are cured. In some cases, it may take more than 60 days to cure a deficiency.

Recommendation:

VII.B.4 If the SHPO/THPO and Applicant do not resolve their disagreement, the Applicant may at any time choose to submit the matter, together with all relevant documents, to the Commission, advising the SHPO/THPO accordingly. The Commission will issue a decision resolving the disagreement within 90 days.

Discussion:

In order to ensure that historic reviews are conducted in an efficient, predictable manner, this section should be revised to require that the FCC resolve disputes within a set timeframe.

Recommendation:

VII.C.2 If the SHPO/THPO does not provide written notice to the Applicant that it agrees or disagrees with the Applicant's determination of no adverse effect within thirty days following its receipt of a complete Submission Packet, the SHPO/THPO is presumed to have concurred with the Applicant's determination. ~~The Applicant shall, pursuant to procedures to be promulgated by the Commission, forward a copy of its Submission Packet to the Commission, together with all correspondence with the SHPO/THPO and any comments or objections received from the public, and advise the SHPO/THPO accordingly.~~ The Section 106 process shall then be complete unless the Commission notifies the Applicant otherwise within ~~a period of time to be specified by the Commission~~ 90 days.

Discussion:

Again, in order to ensure that historic reviews are conducted in an efficient, predictable manner, this section should be revised to require that the Commission act within a defined time period. Moreover, carriers should not be required to submit extensive information to the Commission regarding historic impacts when the Agreement specifies that there would be no adverse effect. Carriers should only be required to submit the information required by Sections 1.1301, *et seq.* of the Commission's rules.

Recommendation:

IX.A In the event that an Applicant discovers a previously unidentified site within the APE that may be a Historic Property that would be affected by an Undertaking commenced after adoption of this Agreement, the Applicant shall promptly notify the Commission, the SHPO/~~THPO~~, and any ~~potentially affected Indian tribe or NHO~~ THPO that has identified the area as religiously or culturally significant to its tribe pursuant to Section V.D, and within a reasonable time shall submit to the Commission and the SHPO/THPO ~~and any potentially affected Indian tribe or NHO~~ a written report evaluating the property's eligibility for inclusion in the National Register. ~~The Applicant shall seek the input of any potentially affected Indian tribe or NHO in preparing this report.~~ If found during construction, construction must cease until evaluation has been completed. Construction that was commenced prior to adoption of this Agreement is not covered by the terms of this Agreement.

Discussion:

This section should be revised to reflect that the Agreement is prospective, not retroactive; construction that was commenced prior to adoption of this Agreement cannot be covered by the Agreement.[18] Also, consistent with Cingular's proposal to exclude tribal consultation issues from this Agreement, Cingular proposes deleting those portions of the section that relate to tribal consultation.

Recommendation:

Add New Section IX.E The Parties to this Agreement agree that tower owners and FCC licensees will not be held accountable for the construction and modifications of facilities that took place prior to their ownership of said facilities. [A corresponding NOTE should be added to Section 1.1307 of the Commission's rules]

Discussion:

As discussed in Section I.A of these comments, this section should be added to create a safe harbor to ensure that current tower owners are not penalized for construction and modification activities that took place prior to their ownership. Forfeitures are designed to penalize wrongdoers and deter non-compliance. Neither goal would be served by penalizing subsequent tower owners.

Recommendation:

XI. Any member of the public may notify the Commission of concerns it has regarding the application of this Nationwide Agreement within a State or with regard to the review of individual Undertakings covered ~~or excluded~~ by the terms of this Agreement within 30 days of public notice of the proposed construction. *See* Sections V.F. & G. Comments related to telecommunications activities shall be directed to the Wireless Telecommunications Bureau and those related to broadcast facilities to the Media Bureau. The Commission will consider public comments and following consultation with the SHPO/THPO, potentially affected Indian tribes and NHOs, or Council, where appropriate, take appropriate actions. The Commission shall notify the objector of the outcome of its actions.

Discussion:

This section should be revised to indicate that the provisions only apply to construction covered by the Agreement. To expedite review and ensure that new issues are not raised at the eleventh hour, this section should also be revised to indicate that members of the public may file comments within 30 days of public notice.

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[18] *See Bowen v. Georgetown University Hospital,* 488 U.S. 204 (1988); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987).

Recommendation:

In lieu of Attachment 3, the Commission should adopt the November 1, 2002 version of the checklist.

Discussion:

The Submission Packet attached to the Agreement is too cumbersome to be implemented on a timely basis by Applicants and SHPOs. The Commission should adopt the November 1, 2001 draft instead.

CONCLUSION

Based on the foregoing, Cingular urges the Commission to revise its rules and the proposed Agreement to create a safe harbor for licensees that acquire facilities that may have not been subject to NHPA review at the time of construction. The Agreement also should be modified to exclude tribal coordination or, at a minimum, streamline the tribal coordination process. Finally, the Agreement should be revised to ensure that it provides finality, consistency, and predictability for those who will be bound by its terms.

Respectfully submitted,

By: David G. Richards /s/
J. R. Carbonell
Carol L. Tacker
David G. Richards
CINGULAR WIRELESS LLC
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342
(404) 236-5543

Its Attorneys

August 8, 2003

THE TULALIP TRIBES

Cultural Resources Department
xaɫaɫ?bc"
6410 - 23rd Avenue N.E.
Tulalip, WA 98271-9694
(360) 651-3300
FAX (360) 651-3312

The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, and Skykomish tribes and other tribes and band signatory to the Treaty of Point Elliott

June 18, 2003

Dear Mr. Eric P. Bixler
Environmental Assessor
LSI Adapt
800 Maynard Avenue South, Suite 403
Seattle, WA 98134

Dear Mr. Bixler:

This is in response to your 6-12-2003 letter, LSI Adapt Project No. WA039158-NEP.

In our SOP's we ask that a thorough archaeological assessment be done before any work be done, regardless of what the office of Historical Preservation may say in reference to their regards. That is why we ask that a site be evaluated by an archaeological firm. TTT would recommend NWAA, Northwest Archaeological Associates, Inc., 5418 20th Avenue NW, Suite 200, Seattle, WA 98107.

We trust their assessments. Any fees accrued would be determined by their office.

Sincerely yours,

Hank Gobin
Cultural Resources Manager

JUL. -29'

AHAMAKAV CULTURAL SOCIETY
Fort Mojave Indian Tribe
P.O. 5990 MOHAVE VALLEY, AZ 86440

May 16, 2003

Gavin Leaver
Environmental Assessment Specialists, Inc
15224 Clymer St.
Mission Hills, CA 91345

RE: Cingular Wireless Site CM-658-02

Dear Mr. Leaver:

The AhaMakav Cultural Society, which is the Historic and Cultural Preservation Office of the Fort Mojave Tribe, has received and reviewed your May 2 letter, and we cannot comment on the presence or absence of cultural resources important to the Fort Mojave Tribe until we receive an archeological survey report. The report must be prepared by a qualified (in comport with the Secretary of Interior's Standards and Guidelines) archeologist. Your cover letter and the information provided is insufficient as a basis upon which we would consult in regard to the proposed undertaking. We also require that subsequent to recommendation of effect (in this case, no historic properties affected, in all likelihood), that the Federal lead agency, the Federal Communications Commission, formally determine in a document on their letterhead the level of effect of the undertaking, a non-delegable responsibility.

If you have any questions, call us at (928)-768-4475.

Sincerely,

[redacted]
Cultural Resource Manager

xc: Elda Butler, Director, AhaMakav Cultural Society
Nora McDowell, Tribal Chairperson
CASHPO
NAHC